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The Judiciary and Constitutionalism in Transitions: A Critique*

Hakeem O. Yusuf

Abstract

The article critically analyses the role of the Nigerian courts in mediating resultant tensions in the post-authoritarian transition period. In doing this, I examine jurisprudence emanating from the courts on some serious inter-governmental disputes, as well as decisions bordering on individual and group rights, particularly those connected to the transition process. The dynamics of democratic transition in Nigeria after decades of military rule dictates the inevitability of these disputes. The military left a legacy of systemic distortion and institutional dysfunctions which constitute formidable challenges to the transitioning society. The article argues a case for a purposive jurisprudential approach to resolving the ensuing tensions which typically threaten the viability of the transition.

KEYWORDS: transitional justice, judiciary, constitutionalism, human rights

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1. INTRODUCTION

In this article, I critically analyse the role of the Nigerian courts in mediating tensions that have emerged in the post-authoritarian transition period. In doing this, I examine jurisprudence emanating from the courts on some serious inter-governmental disputes as well as decisions that touch upon individual and collective rights particularly connected to the transition process. The dynamics of democratic transition in Nigeria after decades of military rule, dictate the inevitability of these disputes. The military left a legacy of institutional distortion and dysfunctions the result of which is a series of ongoing and formidable challenges to the transitioning society. The societal distortions and dysfunctions extend beyond the economic, social and political sectors to the constitutional and legal order. This is due in part to the nature of military rule with its legendary disregard for the rule of law, constitutionalism and due process.

The Nigerian experience is complicated by the predilection of military rulers for a unified command-structure approach to governance in a heterogeneous society. Rhetorically, successive military governments¹ paid lip-service to the preservation of the *federal character* of the country but in practice, the command-structured governance that characterised military rule saddled the country with a caricature federation. Analysts have noted that such unification or ‘high degree of uniformity in the nature of political arrangements’ is second nature to authoritarianism.²

The military legacy has predictably generated (and continues to generate) considerable tension between the central government on the one hand and the (federating) states on the other. Such a tension has brought about critical consequences for constitutionalism and the rule of law in Nigeria. In particular, the legislature and largely, the judiciary have been tasked with resolving the *executive impasse* that has been the fall-out of these tensions in the transition period. However, despite the growing importance of the judicial function in transitioning polities, scant attention has been paid to judicial activity in Africa in general.³ There is thus reason to critically evaluate the state of judicial

¹ That is with the notable exception of the short-lived regime of Major-General John Thomas Aguiyi-Ironsi from January-July 1966 that pioneered military incursion into governance in Nigeria. He abolished the regions and the federal structure of the country. His unification policy was one of the major causes of the rebellion by officers from the Northern part of the country, a bloody coup leading to his death and Nigeria’s 4-year civil war. See Ojo, Abiola. “The Search for a Grundnorm in Nigeria: The *Lakanmi* Case” *The International Comparative Law Quarterly* 20 (1) (1971) 117-136.

² Ni Aolain, Fionnula and Campbell Colm “The Paradox of Transition in Conflicted Democracies” *Human Rights Quarterly* 27 (2005): 172, 182.

³ Prempeh, H Kwasi. “African Judges in their Own Cause: Reconstituting Independent Courts in Contemporary Africa” *International Journal of Constitutional Law* 4 (3) (2006): 592-593.

government in Nigeria in view of recent socio-political developments in the period of transition to civil rule in the country.

The discussion in this article is set against the backdrop of several complexities. These include unresolved issues of transitional justice and reparations for victims of gross abuses of human rights from decades of military authoritarian rule⁴ and concerns regarding the alarming levels of insecurity in the Niger Delta (source of oil, the mainstay of the country's economy).⁵ Other prevailing contemporaneous debacles are the control of the political and economic sectors of the country by erstwhile military rulers (or their acolytes). There is also the issue of continued violations of human rights in the post-authoritarian period by a *democratic* government, growing poverty (associated with IMF/WB economic structural adjustment programmes),⁶ electoral manipulation and violence, etc. Thus framing issues around constitutionalism, human rights and the critical nature of the role of the judiciary in contemporary Nigerian society indicates there is indeed an onerous responsibility on the judicial function. How the judiciary has played, its role can be gleaned from the jurisprudence emanating from decisions relating to these and sundry issues.

I will conduct the analyses within two politically significant period-frames; the transition to civil from authoritarian rule (1999-2003) and the 'civil-civil' transition (2003-2007) in the country. I have framed the periodization in the hope that it would assist in presenting a constructive template for critical evaluation of the fallouts of the identified accountability gap⁷ in the role of judicial governance in the country. The adopted framework is consistent with transitional justice theory. Transitional justice analyses recognise that while it is possible to identify a single 'transitional moment'⁸ identified in 'paradigmatic transitions',⁹ a number of transitions (or transition milestones) may in fact be discernible within the process of political change.¹⁰ In the context of the Nigerian transition, I argue in what follows that there are discernibly distinct strands in

⁴ For a discussion of the stalemate that attended the truth-telling process in the aftermath of the transfer of power in the democratic transition process in Nigeria see Yusuf, Hakeem O. "Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria" *International Journal of Transitional Justice* 1 (2) (2007): 268-286.

⁵ For a recent dispassionate elucidation of the crisis in the Niger Delta see International Crisis Group. "Swamps of Insurgency: Nigeria's Delta Unrest" (2006) Africa Report No.115

⁶ See generally, Okafor, Obiora C. "The Precarious Place of Labour Rights and Movements in Nigeria's Dual Transition, 1999-2005" *Journal of African Law* 51 (2007):68-94.

⁷ Yusuf note 4 *supra*.

⁸ Ni Aolain and Campbell note 2 *supra* at 181.

⁹ *Ibid.*

¹⁰ *Ibid.* at 183 ('...we argue for the need to conceive of transitional situations not as involving one single transition, but in terms of at least two primary sets...This is not to suggest that there may not be other co-terminus primary transitions occurring').

judicial governance that can be evaluated through the prisms of the ‘transitions-within-a transition’ experience of the country.

The judiciary has recently been the focus of both national and international attention as a context that offers hope for the resolution of ongoing disputes and contestations in the public arena. Has the judiciary been instrumental to furthering or impeding the transition to democratic rule, respect for human rights and upholding the rule of law? What has been the nature of judicial intervention in ongoing tensions that emerge from the interplay of a centrifugal federalism and dynamics of political transition in a heterogeneous, resource-rich but impoverished polity? These questions constitute the foci of this article.

2. BACKWARDS WITH PLAIN-FACT JURISPRUDENCE: THE OPUTA PANEL CASE

Barak contends that the role of the Supreme Court in democratic governance is ‘corrective.’ In the discharge of this corrective function, the judiciary is expected to bridge ‘the gap between law and society as well protect democracy in cooperation with the other branches of government.’¹¹ If we agree with Barak on the primary duty of a supreme court, it can be argued that the Supreme Court of Nigeria fell short of this role in its decision in *Justice Chukwudifu Oputa (Rtd.), Human Rights Violations Investigation Commission and Gani Fawehinmi v General Ibrahim Babangida, Brigadier Halilu Akilu and Brigadier Kunle Togun* (the *Oputa Panel Case*).¹² In view of the resounding impact of the case on Nigeria’s choice of transitional justice mechanism and the analyses proposed on the judicial role in transitional contexts below, it is germane to set out the facts of the case in some detail.

The Facts, the Decision.

On the heels of the country’s political transition to democracy after decades of military authoritarianism, then newly elected President Olusegun Obasanjo issued Statutory Instrument No. 8 of 1999 (later amended by Statutory Instrument No. 13 of 1999) to constitute a Judicial Commission of Inquiry for the investigation of human rights violations in Nigeria between 1st January 1984 and

¹¹ Barak, Aharon. “Foreword-A Judge on Judging: The Role of a Supreme Court in a Democracy” *Harvard Law Review* 116 (1) (2003): 19, 28.

¹² [2003] M.J.S.C 63. This is the report of the defendants’ appeal to the Supreme Court following the victory of ‘the Generals’ at the Court of Appeal. Reference will however be made in a composite manner to the matter through the court of first instance (Federal High Court) through to the Supreme Court. Reference to ‘Courts’ in the following context will cover all three courts except as specifically stated.

28 May 1999. The instrument President made pursuant to his powers under Section 1 of the Tribunals of Inquiry Act (TIA).¹³ Formally styled the Human Rights Violations Investigations Commission (HRVIC, the Commission), it became popularly known as the Oputa Panel, earning that sobriquet from the name of the respected retired Supreme Court justice who headed it.¹⁴

In the course of the inquiry, the Commission issued summonses on the Respondents/Plaintiffs (Respondents) to appear and testify before it in response to a petition on the murder of Dele Giwa. The prominent Lagos-based journalist was killed by a letter bomb (the first in the country's history) believed to have been delivered to him by state security agencies under the aegis of the 2nd and 3rd Respondents. They are widely believed to have acted on the instructions of the 1st Respondent, then military head of state. The Respondents were not willing to appear before the Panel. To frustrate the summons, they instituted two separate suits before the Federal High Court against the 1st and 2nd Appellants/Defendants (Appellants) to challenge the powers of the Commission to compel their attendance at the Commission's public sittings. The 3rd Appellant, counsel to the slain journalist joined the suit on his application as an interested party.

The Respondents claimed *inter alia* that it was unlawful for the 1st and 2nd Appellants to summon them to appear to testify or produce documents at the Commission's public hearings. They prayed the court for an order prohibiting the 1st and 2nd Appellants from compelling them to attend the public hearings to answer questions or produce documents. The grounds of the application, amongst others, were that the TIA under which the Oputa Panel was established is not an existing law within the meaning of section 315 of the 1999 Constitution of the Federal Republic of Nigeria. Section 315 makes provisions for savings and modification provisions for existing laws in the country. The Respondents further sought a declaration that the compulsive powers granted the Commission under the TIA are in breach of fundamental rights guaranteed by sections 35 and 36 of the Constitution. Section 35 of the Constitution provides for the right to liberty while section 36 concerns the right to fair hearing. With the concurrence of the parties, the Federal High Court, a superior court of record of first instance, referred constitutional issues arising from the case for determination by the Court of Appeal.

On 31st October 2001, precisely ten days before the close of public hearings by the Oputa Panel, the Court of Appeal ruled on the issues. The Court of Appeal declared the 'compulsive' powers of the 2nd Appellant unconstitutional and in violation of the Respondents fundamental rights contained in sections 35 and 36 of the constitution. Dissatisfied with the decision, the Appellants appealed

¹³ No. 447, Laws of the Federation of Nigeria, 1990.

¹⁴ Yusuf note 4 *supra*.

to the Supreme Court and this enabled the Panel to proceed with the public hearings. The Respondents also cross- appealed.

The Supreme Court held that the Tribunal of Inquiry Act was existing law under section 315 of the 1999 Constitution. It also however held that the Constitution does not confer powers on the National Assembly to enact a general law on tribunals of inquiry for the whole country. This was because neither the Exclusive nor the Concurrent Legislative lists in the Constitution include tribunals of inquiry as a legislative item, unlike the 1963 Constitution, that listed tribunals of inquiry as a specific item in the Exclusive Legislative List. The Court also held that tribunals of inquiry fall within the residual powers of both the National Assembly (for the Federal Capital Territory) and State Houses of Assembly for the respective States. The Tribunal of Inquiry Act of 1966 under which the Oputa Panel was established therefore took effect under the 1999 Constitution as an Act of the National Assembly for the Federal Capital Territory, Abuja only. In essence, the president had exceeded his jurisdiction in establishing the Oputa Panel with a remit to carry out a national inquiry into the violations of human rights in all parts of the country.

Between Executive Failure and Judicial Complacency

The *Oputa Panel* Case eloquently presents two of a number of unsettling features in the legal and statutory framework of governance in Nigeria's political transition. First, is the extensive reliance by all branches of government on autocratic legislation deriving from the colonial past and authoritarian military regimes. Second, is a customary, uncritical judicial adherence to precedent. Deriving from the first feature, an elected democratic transition government placed reliance on the TIA, a pre-republican legislation to set up a truth commission by executive fiat at a time it had become standard practice to do so under purpose-specific legislation.¹⁵ Proceeding on the second feature, the judiciary on its part relied extensively on the case of *Sir Abubakar Tafawa Balewa & Others v Doherty & Others*¹⁶ in which the then Federal Supreme Court and the Privy Council had both upheld objections to the compulsive powers and the jurisdictional reach of the TIA. Without delving into the contentious value of judicial precedents particularly in the common law legal tradition, it is important to make the point that the post-republican Nigerian Supreme Court is not in fact

¹⁵ Thus, the South Africa and Ghana truth commissions that in temporality closely preceded and succeeded the Nigerian truth-telling process respectively were set up pursuant to tailor-made legislation. For a fairly comprehensive and representative discussion of the establishment and conduct of truth-telling processes in different parts of the world, see Hayner, Priscilla B. *Unspeakable Truths: Confronting State Terror and Atrocity*. (New York: Routledge 2001).

¹⁶(1963) 1 WLR 949

or law by the decisions of both authorities. This is because the Federal Supreme Court was not the highest court for Nigeria at the time since as in this case, final appeals still lied to the Privy Council in London. The subsequent republican status of the country saw to the end of precisely that.

The Obasanjo administration relied on shaky legal foundations for addressing crucial transitional justice issues. Such reliance in the aftermath of three decades of authoritarian rule that earned the country international censor clearly places a question mark over the administration's sincerity and the degree of its commitment to justice, human rights and the rule of law in the country. In this regard, the action of the elected executive seriously impaired the fulcrum and *raison d'être* of the transition. This concession notwithstanding, the transition judiciary on its part cannot be excused for its fixation on a rational legal formalism that is impoverished by its lack of engagement with the socio-political circumstances of the country and the developments in the international arena.

In coming to a decision that struck at the root of the truth-telling process epitomised by the Oputa Panel, the Nigerian judiciary in the *Oputa Panel Case* arguably undermined the rule of law (even if not deliberately), in the course of the country's transition from authoritarian rule. The attitude of the Court derived from an entrenched judicial tradition of plain-fact jurisprudence. The Court obviously accorded primacy to protecting the *federal character* of the Nigerian polity over the rights of victims of gross violations of human rights.

It is noteworthy that the violations in issue were largely committed by military regimes that paid no more than rhetorical heed to the country's federal character (like most other established aspects of the country's law and politics) and (mis)ruled it in a virtually unitary fashion. In deference to the *supremacy* of military laws (decrees), the judiciary hardly intervened to check the various violations of the constitution in this regard. It is thus ironic that the transitional judiciary at the highest levels will advert to the territoriality argument as justification to shield alleged perpetrators from accountability.

Further, the Supreme Court upheld the Court of Appeal's position that Sections 5(d)11(1) (b), 11 (4) and 12(2) of the Tribunals of Inquiry Act are unconstitutional and invalid because they empower a tribunal of inquiry to compel attendance or impose a sentence of fine or imprisonment. According to the Court, the sections contravene sections 35 and 36 of the Constitution of Nigeria 1999 that provide for the right to liberty and fair hearing respectively. Mandatory attendance at a truth commission was viewed as contrary to the right to personal liberty. The Court insisted that under the Constitution, only a court of law can make an order to deprive a citizen of his fundamental right to personal liberty. While this position of the Court is attractive, it is arguably not sustainable considering the provisions of section 35 (1) (b) that

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law... by reason of his failure to comply with the order of a court *or in order to secure the fulfilment of any obligation imposed upon him by law.*¹⁷

The Court placed reliance on section 35 (1), which provides for deprivation of liberty in execution of the judgement of a court, as if it were the only derogative clause to individual liberty in the constitution. Such an interpretive approach is, it is humbly submitted, in view of section 35 (1) (b), erroneous. Surely, the Court could on the basis of the proviso in section 35 (1) (b) have upheld the 'coercive' powers of the commission under the 1999 Constitution, even without recourse to comparative legislation and jurisprudence in South Africa, another common law jurisdiction with relevant (and at least persuasive) precedent on the issue. After all, the President constituted the Oputa Panel under a law and the duty to attend the summons of the Commission challenged by the Plaintiffs was imposed by the TIA.

Curious and more objectionable still is the finding that the powers of the Commission contravened fair-hearing provisions of section 36 of the Nigerian constitution. It is a basic procedural practice that has been upheld by the courts (in Nigeria and elsewhere) that evidentiary rules weigh against a party who fails to utilise reasonable opportunity provided to air the party's side of a case, as a result of which such party can not be heard to complain about lack of fair hearing. On the facts in the *Oputa* case, the provisions of section 36, it is respectfully submitted should not have inured to the benefit of the generals. The Oputa Panel summoned the generals as witnesses on the strength of petitions it received and they initiated the case to obtain judicial sanction for depriving the petitioners and the Nigerian society the benefit of the facts peculiarly within their knowledge.

Contestations around the legality of the Commission in various suits and appeals on them instigated by the generals in an attempt at self-preservation brought to the fore the tension that may arise between the truth-telling process and the judiciary in transition. More importantly, the *Oputa Panel* Case in the context of a transitioning polity arguably demonstrates the dangers inherent in the existence of an accountability gap with respect to the judiciary. Such an accountability gap bequeaths a polity with a judiciary that may be immune to the changes taking place in the transition environment all around it.¹⁸

Former authoritarian military rulers are reputedly difficult to bring to accounts. Roehrig has noted that any attempt to ensure accountability for violations of human rights by past military regime in post-authoritarian societies

¹⁷ Emphasis mine.

¹⁸ See generally Yusuf, Hakeem O "Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria" *Law and Policy* 30 (2) (2008) forthcoming.

is fraught with complexities.¹⁹ There is some convergence of opinion on this view. This does not, however, provide justification for avoiding the challenge of re-establishing the supremacy of law over authoritarian exercise of power which had deprived individuals, groups and society in general, of their rights. Supreme Courts in particular have a unique role in a constitutional democracy²⁰ in the pursuit of this objective.

In the foregoing state of affairs, judicial commitment to the duty to bring alive the law as an agent of positive transformation (largely viewed as essentially revolving around the executive and the legislature) is seriously jeopardised or at least in doubt. The phenomenon has been aptly described by Teitel as ‘the rule of law dilemma.’²¹ Teitel has criticized the accounts of law in transitional justice contexts as a product of political change and the restrictive potential it accords the transformative potentials of law in hitherto conflicted societies.²²

In analyses of what now constitutes pioneering experiences in the ‘contemporary wave of political change’ in diverse regions of the world (Eastern Europe through Latin America to Africa), she identifies the judiciary as a powerful institutional agent for transformation. But as she further notes, the judiciary is itself faced with enormous challenges in the mediation of ensuing transitional tensions. Teitel locates the major reason for this in the distinctive nature of law and justice in transitional contexts. Law and justice as *handmaidens* of change make a paradigm shift in transitions. Law is moulded by and also remoulds the society in the flux of transition. The exigencies of the transition context demand new conceptions of law and justice that are at once ‘transformative...extraordinary and constructivist.’²³

The foregoing formulation constitutes what can be considered a historicization of law and justice within the context of transitions. I argue that it ought to be not only a legitimate option for judicial mediation of ensuing conflicts in transitions but *the* option where the judiciary has been implicated in violations of human rights in the period of conflict or authoritarian rule. Adjudication by a ‘transitional judiciary’²⁴ in neglect of the *sui generis* role of law and thus, the adjudicatory function, positively threatens the aspirations for change constitutive of the whole process of political transition. Further, it raises the question of the

¹⁹ Roehrig, Terence. *The Prosecution of Military Leaders in Newly Democratic Nations: The Cases of Argentina, Greece and South Korea* (North Carolina: McFarland & Company Inc. Publishers 2002).

²⁰ See generally Barak note 11 *supra*.

²¹ Teitel, Ruti G. “Transitional Jurisprudence: The Role of Law in Political Transformation” *Yale Law Journal* 106 (7) (1996-7): 2009, at 2018-2022.

²² *Ibid.*

²³ *Ibid.* at 2014.

²⁴ *Ibid.* at 2030.

continued relevance of that arm of government in the post-conflict era and its ability to foster the rule of law.

The Judiciary, Transition and the Transformative Agenda

The gap in governance created by such political power-dynamics accentuates the need for a judiciary committed to engaging constructively with the transformative agenda,²⁵ ideally the hallmark of and legitimising justification for the transition in the first place. This is particularly relevant in the context of a transition that has resulted not in real (as is the aspiration of the people and mantra of the elites now in power) but a virtual democracy. In other words, a situational dynamic in which the ruling elite have perfected the art of manipulating the transition process in a way that does not dislocate their hold on power and yet creates the impression that *liberal* democracy has been instituted.²⁶ The transition to democratic rule in Nigeria presents a good example of this socio-political dynamic.

The elections in the political transition from over three decades of authoritarian rule were strongly contested or influenced by civilians who had held offices under the past military governments or were actually retired military officers in past military regimes.²⁷ Ex-President Olusegun Obasanjo epitomised this dynamic. The former army general and military head of state is generally believed to have been tipped and largely sponsored for president in 1999 by the country's former self-styled 'military president', General Ibrahim Babangida. General Muhammadu Buhari, himself a former military head of state remains one of the frontline contenders to the presidency while General Babangida only dropped his presidential ambitions shortly before the April 2007 elections.

The current president of the Nigerian Senate (the upper house in the two-tier legislature, the National Assembly), is also a retired general and ex-military governor of a state, just as the longest-serving chairman of the ruling People's Democratic Party (PDP), Ahmadu Ali, is a retired army general and one time

²⁵ Corder, Hugh "Judicial Policy in a Transforming Constitution" in Morison, John et al (eds.) *Judges, Transition and Human Rights* (Oxford: University Press Oxford 2007) 91, 93.

²⁶ Joseph, Richard. "Democratization in Africa after 1989: Comparative and Theoretical Perspectives" *Comparative Politics* 29 (3) (1997):363, 367-8. See also Prempeh, H Kwasi. "Africa's 'Constitutional Revival': False Start or New Dawn" *International Journal of Constitutional Law* 5(3) (2007):469, 505: "Indeed, Africa's recent democratic transitions have become an occasion for recycling old elites, not for the emergence of a new generation of leadership."

²⁷ Oyekola, Tunde "Ex-Military Officers are Doing Well in Politics- Gowon" *Nigerian Tribune* (Lagos Tuesday 4 September 2007)

Minister for Education.²⁸ A number of state governors, lawmakers in the federal and state legislatures, ministers and other key public office holders are ex-military men, who occupied strategic public positions under various military regimes in the country. The phenomenon aptly referred to as ‘feigned’ ruler conversion²⁹ situates the judiciary as the unlikely institution of state for holding out the prospect of a genuine realisation of democracy and rule of law commitment as underpinning the political transition.

The situation in Nigeria is not unique as the experience in Ghana (whose political history shares more than a passing similarity with the former) embodied in what has been referred to as the ‘Rawlings factor’ has shown. Jerry Rawlings’ hold on power in the country in the post-authoritarian transition period was so potent that it staved off accountability for human rights violations for eight years after the transition to democracy. This should be no surprise. He was elected civilian president under a transition programme he instituted and supervised. Beyond that, it also reputedly conditioned largely, the choice of transitional justice mechanism finally adopted by the successor administration to achieve accountability for human rights violations.³⁰ The politics of transitions in post-communist Eastern Europe and Latin America have followed a similar course.³¹ The reason for this may not be far-fetched; democratic politics for all of its merits is after all a game played with resources (financial and material) usually in abundance in the arsenals of erstwhile authoritarian rulers, usually privileged by plundered state resources amassed during their tenure. Against this backdrop, it is little wonder that the political dividend the transition process has delivered is a quasi-democracy.³²

Again, the formidable challenges posed by powerful ex-military rulers against efforts to obtain justice in the transition period are largely consistent with the mixed results and varied experience of attempts elsewhere. While in some Latin American countries like Argentina, prosecutions were later ‘rolled back’ in deference to military take-over threats,³³ the judiciary in Greece contributed

²⁸ Abayomi, John. “Ali, PDP Chairman Resigns” *Vanguard Online* (Lagos Monday 8 October 2007). Available at:

http://www.vanguardngr.com/index.php?option=com_content&task=view&id=288&Itemid=43

²⁹ Joseph note 26 supra at 250-251.

³⁰ Oduro, Franklin. “Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana’s National Reconciliation Initiative” *The International Journal of Human Rights* 9 (3) (2005):327, 340-342. See also Attafuah, Ken A. “An Overview of Ghana’s National Reconciliation Commission and Its Relationship with the Courts” *Criminal Law Forum* 15 (1-2) (2004)125.

³¹ Teitel note 21 supra at

³² Okafor note 6 supra at 86.

³³ For an elucidatory account of the challenges in Argentina’s transition from military authoritarian rule in the early ‘80s, see Nino, Carlos S. *Radical Evil on Trial* (New Haven: Yale University Press, 1996).

positively and directly to the restoration of the rule of law by way of fearless adjudication in prosecutions involving erstwhile military rulers in the country.

According to Teitel, twice over confronted with the dilemma of the rule of law, the courts in Germany adopted a jurisprudence in which ‘moral right’ trumped formalist (plain-fact) approach to law, lending credence to the view that transitional justice necessitates a *sui generis* conception of law. In the context of post-communist Eastern Europe’s experience in transition to liberal democracy, the Hungarian judiciary similarly opted for a transition-sensitive response to the rule of law dilemma by protecting the individual’s right to security. Teitel posits that conditioned by different ‘historical and political legacies’, both judiciaries arrived at similar results of ‘transformative understandings’ of the rule of law despite charting different courses.³⁴

The judiciary at all times, but especially in the flux of the transition context, must be wary of the designs of any individual or group to have recourse to judicial process as a shield against justice. This is particularly important for the restoration and fortification of the rule of law in a transitional setting. Such awareness appears to have been lost on the Nigerian Courts in this case. It is a paradox that the military would have recourse to the rights-regime and the courts to stave off accountability. While in power, when it was not busy corrupting or trying to subvert the judiciary through bribery and exclusion clauses, it treated its efforts at judicial independence with contempt at best.

Military governance is unarguably a violation of the rule of law. It violates the constitution of virtually every modern state. Indeed the military usually subjugate the constitution to their political caprice and at least in the African experience, in legal subterfuge, declare their incursion into governance as a revolution to preserve the polity.

In Nigeria, the judiciary had become largely impotent in upholding the rights of individuals in the era of military rule in the country. In the appeal case of *Nwosu v Environmental Sanitation Authority*,³⁵ to take but one example, a Justice of the Supreme Court boldly advised victims of rights violations to seek redress elsewhere. He concluded that the Military left no one in doubt as to the inviolability of their decrees. This *apologia* was borne as much out of a sense of frustration of the courts with the importunate and contemptuous treatment of judicial decisions (and the institution as a whole) by successive military administrations as from an attempt at self-preservation. In a way though, it reinforces the need for accountability for the nature of judicial governance during the years of authoritarian rule. How or why was this possible? Considered against the background of the intransigence of the Nigerian military class towards the judicial institution and the rule of law while in power, it is paradoxical that the

³⁴ Teitel note 21 *supra* at 2019-2027.

³⁵ [1990] 2 NWLR pt.135, 688.

military would turn to the courts ostensibly to protect their rights. However, that recourse reinforces the proposition that a virile, dynamic, independent judiciary is central to the nurture of democracy and human rights.

The decisions of the Nigerian courts in the legal challenges to the Oputa Panel, the key mechanism in the process of restoring human rights and achieving justice for victims of impunity in the transition to democratic rule raises some concerns regarding how the courts intend to respond to the demands for justice and acknowledge violations of human rights. This also extends to what the role of the courts will be in mediating critical conflicts in the transition era and beyond.

One of the concerns is that it appears the courts are pliant to the wishes of ex-military rulers (who appointed most of them). The latter continue to participate directly, by proxies or hover visibly in the background of socio-political life in the country. This leaves a question mark over their required decisional independence. Another is the fact that despite the recourse of the plaintiffs to human rights provisions as one of the twin basis of their case, none of the Courts, not even the Supreme Court, seized on the opportunity to invoke the obligations of the country under international human rights law. Taken together, the two issues raise a third and one perhaps more profound: judges continue to apply and interpret laws inherited from the authoritarian period with ‘uncritical vigour’³⁶ that was the hallmark of their decisions at the time the laws were handed down by dictatorial regimes.

Significantly, counsel to one of the Appellants/Defendants had canvassed that ‘...the Tribunal of Inquiry (the HRVIC) was set up in connection with violation of human rights... for the purpose of implementing a treaty.’³⁷ This provided the Court with the opportunity for advertence to the treaty obligations of the country under the Universal Declaration of Human Rights (UDHR),³⁸ the International Covenant on Civil and Political Rights (ICCPR) and customary international law. But while the Court conceded that the HRVIC was set up in connection with human rights violations, it rejected out of hand any link with the country’s treaty obligations. In the view of the Court, there was nothing in the enabling law (the TIA) to validate that proposition. It thus rejected one of the mediating forces in transition as theorised by Teitel. That line of reasoning also deprived the Court a core value of international law in providing stable understandings of the rule of law in transitional contexts.³⁹

³⁶ Corder note 25 supra.

³⁷ *Brigadier-General Togun (Rtd.) V Hon. Justice Chukwudifu Oputa (Rtd.) & 2 others and General Ibrahim Babangida & 1 other* [2001] 16 NWLR pt. 740, 597 at 662 (cases consolidated on the orders of the court). Hereafter, *Togun v Oputa* (No.2).

³⁸ 10 December 1948 UN GA Res.217 A (III).

³⁹ Teitel note 21 supra at 2028.

It is interesting to note that it was not an issue of debate nor was it suggested that any of the judges who were all invariably appointed by the authoritarian military regimes⁴⁰ should resign despite the questionable role the judiciary played in the pre-transition period. None did. This followed the pattern elsewhere.⁴¹ The oversight that has left the judiciary intact, no doubt strengthened in the Nigerian experience by a tradition of military-imposed constitutionalism may be partly responsible for the apathy to the policy issues surrounding the *Oputa Panel Case*.

It is arguable that the judiciary is obliged to resolve the issues at stake in the *Oputa Case* from the perspective of its national as well as international significance. From the national perspective, the country is in search of a lasting transition to a democratic society where the rule of law will substitute whimsical, authoritarian and usually, brutish deprivation of political, economic, social and cultural rights. Not a few Nigerians had been denied their rights in the period of military rule aptly described in the words of Justice Oputa in (biblical allusion, no doubt) as ‘the years of the locust’.

On the international level, the country was in dire need of assuming its pride of place in the comity of nations as the foremost black nation in the world considering its enormous potentials in the light of its human and material resources. More importantly, the country’s legal obligations under international human rights covenants required the deployment of an effective mechanism to secure reparations for victims of gross violations of human rights, which ought to be promoted by a robust engagement of the judiciary with transitional justice process.

Safety in a Cocoon: Ignoring International Human Rights Law

The Court ought to have taken cognisance of the transitional status of the country, seize the opportunity to enunciate and identify with the developing jurisprudence of the imperative for accountability and justice for victims of gross human rights violations through an affirmation of the *right to truth*.⁴² Some scholars⁴³ are of the view that this right is guaranteed by Article 19 of the UDHR and Article 9(1) the African Charter on Human and Peoples’ Rights (ACHPR). While the former has come to assume the status of customary international law, the country is party to the latter.

⁴⁰ Appointments made in the intervening years of civil democratic governance; 1 October 1960-15 January 1965 and 1 October 1979- 31 December 1983 must qualify this.

⁴¹ South Africa is a good example. See for instance Corder note 25 supra at 93.

⁴² Hayner, Priscilla B. “Fifteen Truth Commissions-1974 to 1994: A Comparative Study” *Human Rights Quarterly* 16 (1994): 597, 607 and 611 (Emphasis mine).

⁴³ Quinn, Joanna R. “Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile” *Netherlands Quarterly of Human Rights* 19 (4) (2001): 383, 388.

The Inter-American Court of Human Rights has been the most progressive of existing human rights mechanisms in its explication and development of a jurisprudence affirming a right to truth for victims of human rights violations. The Court, along with its sister mechanism, the Inter-American Commission on Human Rights faced with a large number of ‘enforced disappearance cases’⁴⁴ has stated in a number of its decisions that there is a right to truth for relations of victims of such disappearances.⁴⁵ The *locus classicus* on the matter is the case of *Velasquez Rodriguez v Honduras*⁴⁶ where the court held that relations of an individual who was arrested, reportedly tortured and then ‘disappeared’ were entitled to have the report of an independent and transparent investigation carried out by the State into the disappearance.

Counsel to the HRVIC advanced the argument (without success) that the Commission was properly set up under the ACHPR. The Court held that for this to avail there was the need for specific legislation setting up the HRVIC and investing it with powers to carry out an inquiry of the nature the HRVIC was meant to accomplish.⁴⁷ The constitutional panel⁴⁸ of the Supreme Court of Nigeria made only a dismal reference to international human rights law.

The socio-political circumstances of the country at the time required the courts to adopt a reflexive jurisprudence in the determination of the *Oputa Case*. The Supreme Court of Nigeria in particular, ought to have proceeded on the premise that the issues arising from the case transcend the question of the personal rights of the plaintiffs. Regrettably, like the Court of Appeal, the Supreme Court preferred placing premium on how the ‘coercive’ powers of the commission interfered with individual rights. A broader perspective commends the view that the issues involved may no doubt ‘offend’⁴⁹ individual rights. Yet they also border even if implicitly, on the obligation of the country to ensure that victims of human rights violations are provided with an opportunity to be heard and provided an effective remedy.

The decisions of the Nigerian Courts on the Oputa Panel arguably demonstrate a glaring disconnection of the judiciary with the transitional realities

⁴⁴ Davidson, Scott. *The Inter-American Human Rights System* (Aldershot Dartmouth: Ashgate Publishing Company 1997).

⁴⁵ See for instance *Neira Alegria v Peru* Inter American Court H.R series No.20 (1995), 16 HRLJ 403.

⁴⁶ Inter-American Court H.R. Series C No.4 (1988), 9 HRLJ 212.

⁴⁷ *Oputa Panel* Case note 12 supra at 85-86.

⁴⁸ The full complement of 17 Supreme Court Justices does not sit *en banc* on cases as a panel unlike the US Supreme Court. 5 Justices constitute the Court in its ordinary appellate and original jurisdiction. A panel of 7 Justices sits over ‘constitutional’ matters. In legal circles, the ‘Constitutional Panel’ is conventionally presumed to be the highest adjudicative forum in the country.

⁴⁹ *Togun v Oputa* (No.2) note 37 supra at 645.

of the society. As mentioned earlier, Nigeria ratified the ACHPR in 1982. The country had gone further to incorporate it into domestic legislation as far back as August 1983. The Supreme Court of Nigeria is bound to respect international customary law as embodied by the UDHR. It also has a 'double' obligation in respect of the ACHPR that is at once an international treaty and municipal legislation. The latter reinforces and expands the limited bills of rights encompassed in successive Nigerian constitutions including the current one of 1999.

The decisions of the Nigerian courts in the *Oputa Panel* Case reflect an impervious disposition to the current position of international human rights law on state obligations regarding victims' *right to truth* and accountability in transitional societies. The attempt by counsel for the Oputa Panel to open the window was resisted by the only justice who did not go beyond a cursory reference to it. The significance and historic nature of the case does appear to have been lost on the courts. Ratification of international covenants by a state constitutes an undertaking to fulfil the commitments stated in them.

A state voluntarily surrenders part of its sovereignty in ratifying international covenants. On questions of international law, treaty obligations and human rights, the decisions of the United Nations specialised committees and regional human rights institutions deserve more than a 'persuasive' status. This is in line with state-party obligations under international law. Such obligations include according recognition to decisions made by mechanisms established for ensuring compliance with the instruments. It can be argued that decisions on covenants' provisions by appropriate bodies ought to be regarded as canons to be observed by contracting parties. Otherwise, the whole field of international law will be rendered irrelevant.

Privileging the Domestic Law over International Law

The foregoing further raise the propriety of the precedence sometimes accorded to domestic law (ordinary or constitutional) over international covenants. The issue is particularly topical in jurisdictions like Nigeria and South Africa where the constitution requires that a treaty must be enacted by the National Legislature in order for it to take effect as binding law in the country.⁵⁰ Nigerian courts have developed an ambivalent jurisprudence on the issue. In *Gani Fawehinmi v General Sanni Abacha (Fawehinmi)*,⁵¹ the Supreme Court of Nigeria held that the provisions of the ACHPR cannot prevail over the Nigerian constitution. In the lead judgment, Ogundare JSC conceded that the Charter as enacted under Nigerian Law (Cap. No.10, Laws of the Federation of Nigeria,

⁵⁰ See s.12 of the Constitution of the Federal Republic of Nigeria 1999.

⁵¹ (2001) CHR 20.

1990) possessed an ‘international flavour’ and ‘a greater vigour and strength than any other domestic statute’. However, he proceeded to hold that

But that is not to say that the Charter is superior to the constitution...Nor can its international flavour prevent the National Assembly...removing it from our body of municipal laws by simply repealing Cap No.10.⁵²

With that, the constitutional (and highest) panel of the Supreme Court overruled the decision of the Court of Appeal. The latter had accorded special and decidedly higher status to the ACHPR.⁵³ The Court of Appeal had decided that the international statute had superior status to other municipal laws. It is submitted that the position of the Court of Appeal that accords special recognition to the statute as an international covenant ought to be the correct statement of the law.

The judicial position that constitutions of state constitutions are superior to international law the same state has contracted to adhere to cannot be valid. Such jurisprudence hits at the roots of international law. It is standard to find that treaties provide for the binding nature of their provisions on state parties and require that they take adequate measures for the implementation of their provisions. A good example is Article 2 of the ICCPR

Where not already provided for by existing legislative or other measures, *each* State Party to the present Covenant *undertakes to take the necessary steps*, in accordance with its constitutional processes and with the provisions of the present Covenant, to *adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant*.⁵⁴

In view of Article 2 of the ICCPR, it should not be open to municipal courts to override treaty provisions by domestic law. Cases of apparent or implicit conflict between the two ought to be resolved in favour of international law. This is consistent with Articles 26 and 27 of the Vienna Convention.⁵⁵ Article 26 affirms the binding obligation created by treaties on contracting states. Article 27 provides that provisions of domestic law may not be invoked to justify failure to perform treaty obligations.

The Nigerian courts ignored the obligation of the country under the ICCPR. Article 2(3) provides that individuals whose rights or freedoms recognized by the covenant are violated are entitled to an effective remedy. The ICCPR similarly guarantees to an individual claiming such a remedy a right to have his claim determined ‘...by competent judicial, administrative or legislative

⁵² Ibid. at 42.

⁵³ It is enacted as Cap.10, Laws of the Federation of Nigeria 1990.

⁵⁴ Emphasis mine.

⁵⁵ Vienna Convention on the Law of Treaties concluded at Vienna 23 May 1969. Entered into force 27 January 1980; U.K.T.S (1980), Cmnd 7964; UNTS 331.

authorities or by *any other competent authority provided by the legal system of the State*'. The latter clause *any other competent authority* covers a Truth Commission established by law (like the Oputa Panel) with a mandate *inter alia*, to 'investigate' cases of rights violations and 'make recommendations' for 'appropriate compensation.'

The Oputa Panel clearly constituted the strongest if not the only mechanism chosen by the government to comply with its obligations in this context as discussed earlier. The mandate of the Commission addressed virtually all foregoing obligations. Only a handful of individuals (less than ten) were facing criminal charges at the time for some of the atrocities committed during the Abacha regime. To date, none of the trials has been concluded. Over 8 years protracted trial of the former Chief of Army Staff, General Ishaiya Bamaïyi and four other minions of the late dictator, General Sanni Abacha, in *The State v General Isahiya Bamaïyi & 4Ors*⁵⁶ typifies how the current state of Nigeria's criminal law and procedure can be exploited by powerful individuals to frustrate the administration of criminal justice in the country.

It is pertinent that in the context of the transition in Nigeria, the rights of victims to obtain a remedy thereby relied on a great extent on the truth-telling process. It was quite open to the Supreme Court in particular as the court of last resort to have taken the expansive view of the facts and law and come to a radically different decision. Disappointingly, it took a rather restricted view of the issues in the case. The decision did not take cognisance of the fact that the nation was at the threshold of history, in transition and making a decisive break with a past of human rights violations.

Truth Commissions have now acquired the status of a recognised mechanism for addressing past human rights abuses in transitional societies.⁵⁷ They have taken a position of increased significance alongside other transitional justice mechanisms. They play an important role in efforts to restore the rule of law in post-conflict societies. The Supreme Court ought to have seized upon the reliance of the applicants on the fundamental rights provisions guaranteed by the constitution to consider the right of victims to a remedy as provided by the foregoing provisions. This would have provided it with a balanced progressive jurisprudence on the matter.

⁵⁶ LD/7C/99. See for instance V Efeizomor "Lagos to Review Bamaïyi, Al-Mustapha's Case" *Daily Independent* Online Edition (Lagos Nigeria Monday 23 July 2007).

⁵⁷ UN Security Council Document No.S/2004/616 Report of the Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' at 17. Available at: <<http://www.daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>> (10th October 2005).

Policy Considerations and Transitional Justice Claims

Asides normative imperatives of international law, policy considerations should have been positively taken into account by the Court to the benefit of the defendants in the *Oputa Panel* Case. Nwabueze has made the important point that consideration of public policy may contribute positively to judicial determinations. The guiding principle he advocates, is that public policy considerations, particularly of the subjective type, be subordinated to legal principles and ‘objective standards.’ He further suggests that ‘considerations of expediency’ in deserving instances ‘may justifiably inform the application of law by the courts in the solution to problems.’⁵⁸ Nwabueze’s postulation on the value of public policy in judicial decision-making, it can be argued, supports the position that the Nigerian courts should have had advertence to the principle to decide the *Oputa Panel* Case in a manner cognisant of the societal expectations at the time in Nigeria’s socio-political history.

A crucial issue on which the Nigerian courts found for the applicants was the unconstitutionality of the so-called ‘coercive’ or ‘compulsive’ powers of the Commission. These were the powers of the Commission to *subpoena* witnesses⁵⁹ and punish for contempt.⁶⁰ The courts held that those powers impugned the fundamental right to liberty guaranteed by section 36 of the 1979 constitution of Nigeria (now section 46 of the 1999 constitution). This aspect of the decision in the *Oputa Panel* case, even from the purely formal legal point of view, is curious. The right to liberty under the Nigerian constitution of 1999 as well as earlier constitutions, and indeed in line with international human rights law and practice, can be and is in practice derogated from in defined circumstances. One context in which such derogation might take place concerns reasonable suspicion of the commission of an offence, which was precisely in issue before the Commission.

A Truth Commission has an extended form of inquiry as its core function. This core function can be easily frustrated or defeated if the Commission lacks the power to summon witnesses and issue *subpoena* for the production of evidence. Such power is in state practice not at all novel for quasi-judicial bodies in the country in question. Similar powers are statutorily conferred and exercised with judicial sanction by professional disciplinary bodies in Nigeria.

By way of comparison, the South African TRC had very wide powers to summon witnesses, subpoena evidence, and order the search of premises and seizure of materials⁶¹ as part of its notably ‘significant procedural powers.’⁶²

⁵⁸ Ibid. at 7-8.

⁵⁹ TIA note 13 *supra* Section 6

⁶⁰ Ibid. Section 11.

⁶¹ Promotion of National Unity and Reconciliation Act (PNURA) No.34 of 1995. See sec 30, 31, 32 and 33.

Powers of similar purport were contained in the Ghana National Reconciliation Commission Act.⁶³ It is doubtful that a truth commission without such powers can effectively carry out its functions.⁶⁴ At the very least, the relevance of such a truth-telling process will be diminished. In all events, the Court ought to have positively construed the provisions of section 8 of the TIA that emphasised the *fact-finding* remit of the Oputa Panel. It provided that evidence taken under the Act shall be inadmissible against any person in any civil or criminal proceedings except in the case of a person charged with giving false evidence before the members. Section 10 further reinforces the protection granted to witnesses testifying before the Commission by restating the rule against self-incrimination at the standard set for witnessing before a court of law.

In contrast, a reflexive jurisprudence suggesting a constructive engagement with the process of transition was enunciated by the Constitutional Court of South Africa in litigation challenging the truth-telling process in the country's transition to popular democracy. The decision of the Constitutional Court of South Africa (the Constitutional Court) in *Azanian Peoples' Organisation (AZAPO) & 3 Ors v President of the Republic of South Africa 4 Ors* (the *AZAPO Case*)⁶⁵ stands out in this regard. The applicants sought an order declaring the amnesty provisions in section 20 of the TRC Act void. They were particularly aggrieved that section 20(7) of the TRC Act extinguished criminal or civil liability of the perpetrator for the amnestied criminal act. The absolution from liability also extended to the state as well as any other body, individual or corporate that would have been vicariously liable for the violation in question.

In approaching the issue, the Constitutional Court conceded that the provisions could be considered a limitation of the constitutional provisions on the right to seek settlement of disputes in a court of law guaranteed by section 22 of the Constitution of the Republic of South Africa. In resolving the issue, the Court resorted to the constitution to determine whether there was any other provision that permitted a limitation to the right in section 22. In the event there was none, it sought to determine whether the limitation could be justified in terms of section 33(1) of that constitution which allowed for some limitations by 'law of general application' to rights provided in the constitution. However, the Court placed premium on the fact that the society was in transition.

Thus, while the Constitutional Court recognised that

⁶² Christodoulidis, Emilios A. "'Truth and Reconciliation' As Risks" (2000) 9/2 Social & Legal Studies, 179,186.

⁶³ See s.15 and 16 of the National Reconciliation Commission Act 2002 (Ghana).

⁶⁴ Richard, Wilson. "Violent Truths: The Politics of Memory in Guatemala," *Accord: An International Review of Peace Initiatives* (1997), <http://www.c-r.org/accord/guat/accord2/wilson.shtml>.

⁶⁵ Constitutional Court of South Africa, Case CCT 17/96 25 July 1996, 1-56; [1996] 4 South Africa Reports 671.

every human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack⁶⁶

it preferred to be guided by the dynamics of the transitional context when it stated that ‘*the circumstances in support of this course require carefully to be appreciated.*’⁶⁷ In recognition of the social context, the Constitutional Court emphasised the need to provide an environment conducive to the emergence of *the truth*. The Constitutional Court held that surfacing *the truth* could only be achieved where perpetrators were assured that they would not be liable to trials, criminal or civil, when coming forward to give their testimonies. The question of amnesty as a part of the truth-telling process, the court noted was part of a ‘historical situation’ the country was confronted with in the process of transition to a democratic order.⁶⁸

Arguably, the Constitutional Court was aided in its decision by the fact that the operative constitution was negotiated for a society in transition. Thus, the court held that

The real answer ...seems to lie in the more fundamental objectives of the transition sought to be attained by the constitution and articulated in the epilogue itself. What the constitution seeks to do is to facilitate the transition to a new democratic order, committed to ‘reconciliation between the people of South Africa and the reconstruction of society’.⁶⁹

But the purposive interpretation placed on the constitutional provisions by the unanimous decision of the Constitutional Court was central to achieving the historic purpose.⁷⁰ This is particularly so when it is considered that Mahomed DP, delivering the lead judgement, concluded *inter alia* that his decision to uphold the amnesty provisions of the TRC Act was based on the ‘most comprehensive and generous’ view of the relevant constitutional provisions.⁷¹

It is pertinent to note that while the decision in the *AZAPO* Case upholding the constitutionality of the amnesty procedure served to progress the truth-telling process in South Africa, it is noteworthy that though the *Opota* Case acts as an example of negative interaction between the transitional judiciary and transitional justice mechanisms, it is by no means unique. The ensuing tension is similarly reflected in a few other legal challenges to the TRC. A notable example is the

⁶⁶ *AZAPO* Case note 65 supra 17.

⁶⁷ *Ibid.* at 17. Emphasises mine.

⁶⁸ *AZAPO* Case note 65 supra at 22.

⁶⁹ *Ibid.* at 38 per Mahomed DP.

⁷⁰ It is apt to note the decision was also a unanimous one.

⁷¹ *AZAPO* Case note 65 supra at 44.

decision of the Appellate Division of the Supreme Court of South Africa (now the Supreme Court of Appeal) in *Brigadier Jan du Preez and Major Gen. Nick van Rensburg v Truth and Reconciliation Commission*.⁷² The TRC pursuant to its powers to determine its rules of procedure under section 30 of the TRC Act, sought to create an informal and culturally-sensitive atmosphere for victims to narrate their experiences before the Human Rights Violations Committee (HRVC). One of the ways to achieve the ways it hoped to achieve this was by excluding cross-examination.

Brigadier Jan du Preez and Major Gen. Nick van Rensburg challenged the validity of section 30 of the TRC Act. They claimed it was in violation of section 24 of the 1993 of the Interim Constitution of the Republic of South Africa. The TRC had caused to be served on them notices to the effect that ‘an unnamed witness would testify that they were involved in, or had knowledge about, the poisoning and disappearance of a person, also unnamed’ at stated location and date. They demanded prior service of the statements of the witnesses before the scheduled hearings, a request the TRC turned down. The case for the TRC was that the remit of the Committee was investigatory and not judicial and thus it ought not to be bound by the legal formalism of courts.

The Supreme Court upheld the objection of the Applicants on the premise that the TRC was obliged to observe the principles of natural justice notwithstanding the nature of the proceedings. Once the TRC received information that may be prejudicial to a person, it was under obligation to furnish the concerned individual with such information prior to its being heard publicly as information of that nature could lead to criminal proceedings. The decision significantly hampered the work of the TRC. It led to not only logistics problems but also the rather awkward circumstance of prior exposure of the Commission’s report to alleged perpetrators.⁷³

Unlike the constitutional situation in South Africa, the 1999 constitution of the Federal Republic of Nigeria under which the truth-telling process in Nigeria reflected in the *Oputa Case* was challenged by the generals, remains much-contested. Mid-wife and imposed by the military as part of a transition to civil rule programme, it lacked public ownership.⁷⁴ Again, as earlier noted, the truth-telling process was initiated by executive action under an existing legislation as

⁷² 1996 (3) SALR 997 (A) at 233C-E quoted in D

⁷³ TRC Report Volume 1 Chapter 7 page 174-186. Available at: <http://www.info.gov.za/otherdocs/2003/trc/> (12 September 2007).

⁷⁴ See for instance Ogowewo, Tunde I. “Why the Judicial Annulment of the Constitution of 1999 is Imperative to the Survival of Nigeria’s Democracy” *Journal of African Law* 44 (2000):135-166 arguing that the constitution is illegal, lacks moral authority, constitutes a deceit and is thus void.

against the purpose-designed legislation of the TIC. This may have piled the stakes somewhat against the Oputa Panel.

The needs of the times; restoration of the rule of law, reparations for victims of gross human rights and transformation of societal institutions, required an activist consideration of the issues arising from the truth-telling process. The Nigerian courts ought to have broken away from the conservative stance characteristic of traditional commonwealth judiciaries and opt for a jurisprudence reflecting not a 'legalistic' consideration of the issues in contention but an activist posture that is sensitive to the 'ideals of the nation.'⁷⁵

The decision of the Supreme Court could have been different if it took a purposive approach to the legislation in question. Such an approach would allow it to uphold the establishment of the Commission for investigating past human rights violations as a measure for ensuring 'order and good government of the Federation or any part thereof'. Section 4 (1) of the Constitution of 1999 confers this power on the Federal Government of Nigeria.

3. TWO DECISIONS AND THE PURPOSIVE APPROACH: HOPES FOR TRANSFORMATION?

The PDP Case: When Death is not to Die

Achieving institutional transformation presents 'profound challenges' to states in transition. How to deal with existing states institutions with a record of inadequacies in governance or even outright complicity for human rights violations have also tasked transitional justice analysts.⁷⁶

Institutional engagement with the transitional contexts would be required for the desired transformation. Such a commendable recognition of and engagement with the transitional context of the country was displayed by the majority decision of the Supreme Court (constitutional panel) in the earlier case of *Peoples Democratic Party & 1Or. v. Independent National Electoral & 4Ors (PDP Case)*.⁷⁷

A Lacuna, a Formidable Minority and a Slim Majority

The case emanated from the Transition to Civil Rule Programme of the military regime led by General Abdussalami Abubakar in 1999. The crux of the matter was that following his election in the gubernatorial elections as Governor-

75 Nwabueze, Benjamin O. *Judicialism in Commonwealth Africa-Role of Courts in Government* (London: C Hurst & Company 1977) 75.

76 Ni Aolain and Campbell note 2 supra at 200.

77 (1999) 7 S.C Part II 35.

elect of Adamawa State,⁷⁸ Atiku Abubakar (and before he was to take the oath of office), was subsequently nominated by Chief Olusegun Obasanjo to run as his vice-presidential candidate on the platform of the same party, the PDP. They won the presidential election on that joint ticket.

The situation was thus that Atiku was no longer available to be sworn in as Governor of Adamawa State. The electoral body, the Independent National Electoral Commission (INEC), indicated its intention to conduct a bye-election for the office of Governor and Deputy Governor in the State on the premise that Abubakar's acceptance to run as vice-presidential candidate rendered the position of Governor-elect vacant. In a letter sent to him by INEC, the electoral body averred that since he had not been sworn-in, his deputy could not 'automatically take over the position.' Bonnie Haruna, Atiku's running mate, challenged that move in court, contending that he ought to be sworn-in as governor in the circumstances.

Faced with the situation where there was an obvious lacuna in respect of a key issue in electoral legislation in an all-important transitional process, the learned justices reasoned that for the court to perform its constitutional functions

*effectively and satisfactorily, it must be purposive in its construction of the provisions of the constitution. Where the constitution bestows a right on the citizen... we have the duty and indeed the obligation to ensure that the inured right is not lost or denied the citizen by construction that is narrow and not purposive.*⁷⁹

The Court held that the intention of the framers of the law was to provide for situations where for one reason or the other (the ultimate being death), the deputy governor should step into the office of the governor where the latter is no longer available to take up his position.⁸⁰ The Court with a split decision of 4 to 3; (Uwais, Chief Justice of Nigeria with the majority, Justices Ogundare Mohammed and Uwaifo strongly dissenting) thus abandoned the unambiguous provisions of the law and sought to discover *legislative intent* in a radical and implicit recognition of the unique situation of transition from decades of military authoritarian rule to civil democratic governance.

Specifically, Uwais CJN, in the lead judgement decided that the provisions of section 37(1) of the State Government (Basic Constitutional and Transitional Provisions) Decree 3 of 1998, to the effect that

If a person duly elected as governor dies before taking and subscribing the oath of allegiance and oath of office, the person elected with him as deputy shall be

⁷⁸ One of Nigeria's thirty-six.

⁷⁹ PDP Case note 77 supra at 47-48. Emphasises mine.

⁸⁰ Ibid. at 71-72.

sworn in as governor and he shall nominate a new deputy governor from the same senatorial district as that of the deceased governor who shall, with the approval of the House of Assembly of the state be appointed as deputy governor.

must be liberally construed. Leading the majority, he maintained there was nothing sacrosanct about the word 'die' in the provision thereby reversing the premise for the decision of the Court of Appeal that had preferred the literal (plain fact) approach. Rather, it should be liberally construed to accommodate a case where the elected candidate was 'unavailable' to be sworn in. It dismissed the plain fact interpretation approach adopted by the Court of Appeal as 'narrow and restrictive' and sometimes inappropriate to fulfilling or advancing 'the intention, spirit, objects, and purposes of the Constitution.'⁸¹

The Supreme Court went on to hold that since in relinquishing his Governor-elect status Atiku Abubakar was irrevocably barred from reclaiming it, his action could, in the words of the Court be 'likened to permanent incapacity or even death.' In the circumstances, his action came within the contemplation of the relevant provisions of the law.⁸² For this proposition, the Court relied heavily on the provisions of section 45(1) of the same law, which provides for the Deputy Governor to hold the office of Governor where the latter becomes vacant due to death, permanent incapacity or removal for any reason.

The majority judgment was strongly⁸³ criticised in the dissenting judgements as deliberate usurpation of the legislative function under the guise of interpretation. Ogundare JSC objected to what he rightly sensed was a 'policy' decision. The duty of the Court, he insisted was not to 'determine what the legislature meant to say but what it actually said.'⁸⁴ The plain fact interpretation according to the learned justice was the proper approach and it was not within the competence of the Court to attempt modification of unambiguous provisions to 'bring it into accordance with its own views as to what is reasonable.'⁸⁵ He averred that any gap in legislation must be left to the legislature to fill for the contrary would amount to 'judicial legislation' that was not the function of a court.

In the *lead* dissenting judgement, Ogundare JSC posited that there was no lacuna in any event, in the provisions of section 37(1) of the State Government

⁸¹ *PDP Case note 77 supra* at 71.

⁸² *Ibid.* at 61.

⁸³ The dissent was so extensive it doubled the length of the lead judgement and the concurring decisions of the majority put together. Thus for instance whereas in the *Judgements of the Supreme Court of Nigeria Delivered in July 1999 (part II)* (Lagos: Law Breed Limited 1999) the lead judgement and the three concurring judgements are reported on pages 35-72, the dissenting judgements takes up pages 73-149.

⁸⁴ *PDP Case note 77 supra* at 91.

⁸⁵ *Ibid.* at 93.

(Basic Constitutional and Transitional Provisions) Decree 3 of 1998 that was in contention.⁸⁶ Subscribing to these views, Mohammed JSC similarly contended that ‘policy, expediency, political exigency and convenience’ ought to be excluded from constitutional interpretation⁸⁷ thus implicitly (at the least) rejecting a reflexive jurisprudential approach to the transitional processes ongoing in the country at the time. In towing the line of dissent, Uwaifo JSC, expressly dismissed the majority’s preference for a ‘purposive approach.’ His position was based on what he (rightly) surmised was a radical change in the traditional jurisprudence of the Court

[...] the line of decisions of this court on the preference for the literal interpretation of statutes whose words are clear, precise and unambiguous is intimidating and can not be ignored by sheer resort to another principle of interpretation which may in a sense tend to overrule or undermine those other decisions indirectly and without justification.⁸⁸

This was despite his concession that the liberal or broad interpretational approach was suited among others to ‘circumstances to cover such eventualities due to changing times, different social environments [...] not fully contemplated or overlooked at the time the constitution was drawn up.’⁸⁹ He thus discounted the circumstances of political transition (arguably an inextricable part of the case), as not momentous (enough) to warrant a departure from the *plain fact* jurisprudential tradition of the Nigerian Supreme Court.

In fairness to the dissenting judgement, it is noteworthy that the provisions of section 45 unlike section 37(1) in fact and by the concession of the Court applies after the Governor and the Deputy Governor had been sworn-in. Thus, on the facts of the case, section 45 would be inapplicable. Yet, the Court in its majority decision took the view that since the legislation in issue was constitutional in nature, the document must be ‘read together as a whole.’ It thus had no problem in arriving at the decision that the rationale of the provisions taken together was to avoid a vacuum in the important office of Governor and ensure a ‘smooth’ succession.⁹⁰ To hold otherwise in the context of a fragile transition with a highly sceptical public,⁹¹ wary of ‘transitions without end’ and

⁸⁶ *PDP Case note 77* supra at 85 to 99. Uwaifo JSC expressed similar sentiments. See page 126-28.

⁸⁷ *Ibid.* at 111.

⁸⁸ *Ibid.* at 123

⁸⁹ *Ibid.* at 123. Emphasis mine.

⁹⁰ *Ibid.* at 72-73

⁹¹ Lewis, Peter. *Performance and Legitimacy in Nigeria’s Democracy- Afrobarometer Briefing Paper No.46* (July 2006) Available at: <http://www.afrobarometer.org/Papers/AfrobriefNo46.pdf>. (25 September 2007). The survey concludes that ‘popular attitudes suggest that Nigeria’s new democracy remains fragile, and suffers a growing deficit of popular confidence.’ (at p.2)

dashed hopes on an end to authoritarian rule, would have constituted a disservice to the role of law and the transition judiciary in a post-conflict dynamic.

Breaking Away from Tradition

A fundamental issue in the *PDP* Case is the nature of the rights of the 2nd plaintiff, Bonnie Haruna, Atiku's elected running mate for Deputy-Governor. The law in question, the State Government (Basic Constitutional and Transitional Provisions) Decree, even as the title suggests, was constitutive of the transitional arrangements going on in the country at the time, particularly with respect to elections. While conceding the constitutional nature of the legislation, the Respondents argued that the law was intended to provide a framework for governance of the country in the transition period and not to create individual rights.

In rejecting the contention, the Court held that constitutional legislation establishes rights that the courts must be 'creative' to protect and uphold. This approach led the majority to hold that where the Governor-elect abdicates, abandons or relinquishes his mandate, the Deputy Governor-elect (though elected on a joint ticket) does not thereby forfeit his right to the latter position. This was so because they had each acquired individualised rights by their election, the one to be governor and the other, deputy governor.⁹² The right so conferred was of a public nature and did not inure to the benefit of an individual who was not elected. Quite importantly, the Court noted that to hold to the contrary was not only 'fallacious but *dangerous* to the democratic process.'⁹³ I share this concern.

Regrettably, as earlier noted, the court failed to carry forward such a *purposive* approach in the subsequent *Oputa* Case particularly with regard to the rights of the victims of authoritarian rule. The judicial misdirection that set the stage for non-implementation of the Panel's recommendations has been attended by dire consequences for transitional justice, social stability and economic development in Nigeria. The bedlam in the Niger Delta, where whole communities came forward with serious allegations of violations of human rights by the state and multinational corporations at the Oputa Panel but failed to obtain redress is but one cardinal indicator of this.

The ICPC Case: Federalism v Commonwealth

The foregoing purposive approach to judicial interpretation was also adopted by the Supreme Court in another epoch-making case in the transition

⁹² Ibid. at 50

⁹³ *PDP* Case note 77 *supra* per Ayoola JSC at 148. Emphasis mine.

period. This was in *Attorney General of Ondo State v Attorney General of the Federation & 35Ors* (the ICPC Case).⁹⁴

From the Doldrums of Infamy

At the dawn of the transition to civil rule, Nigeria had become a notoriously corrupt country, occupying the non-enviable position of second most corrupt nation in the world according to Transparency International's corruption index.⁹⁵ The country has been cited as 'the crowning example of governmental corruption and betrayal of the hopes of the citizenry in Africa.'⁹⁶

Combating corruption in the polity was clearly a policy imperative for an incoming administration intent on halting the downward spiral in the nation's economic and social development or even one determined to move the society towards the realisation of its full potentials. Then incoming-President Olusegun Obasanjo recognised the enormity of the problem of corruption in the country. In his inaugural address to the nation at his swearing-in, he expressed the determination of his administration to tackle corruption that he described as 'a full-blown cancer' and 'the greatest single bane of our society.'⁹⁷

To underscore the administration's commitment to combating the scourge of corruption as a major policy initiative, the anti-corruption law was the first executive bill submitted by the executive to the National Assembly (the federal legislature) for enactment. After stiff opposition from a considerable number of legislators, excision or tempering of some perceived 'draconian' provisions and public outrage at the obvious reluctance of the legislature to pass the bill into law, the National Assembly enacted the Corrupt and Other Related Offences Act No.5 of 2000 several months later.⁹⁸

The explanatory memorandum at the end of the law states its purpose as the prohibition and prescription of punishment for corrupt practices and other related offences. In addition, it established the Independent Corrupt Practices

⁹⁴ (2002) 6 S.C. Pt I

⁹⁵ Independent Corrupt Practices and Other Related Offences Commission *Progress Report 2000-July 2005* (ICPC Abuja 2005) 2. Available at: <http://www.icpc.gov.ng/history.php> (1 September 2007).

⁹⁶ Iheukwumere, Emmanuel O and Iheukwumere, Chukwuemeka A "Colonial Rapacity and Political Corruption: Roots of African Corruption and Misery" (2003) 3 Chicago-Kent Journal of International and Comparative Law 1, 46-60.

⁹⁷ Nigeria World "Inaugural Speech by His Excellency, President Olusegun Obasanjo following his Swearing-in as President of the Federal Republic of Nigeria on May 29, 1999". Available at: <http://nigeriaworld.com/feature/speech/inaugural.htm>

⁹⁸ In Nigeria's federal legislative tradition, federal and state statutes are referred to as 'Acts' and 'Laws' respectively. However, I use the term 'law' generically in this piece to refer to both forms of legislation except where clarity demands specificity.

Commission (ICPC, the Commission) to investigate and prosecute offenders. The powers of the ICPC extended to all individuals, public and private, including corporate bodies in the country. The all-encompassing reach of the ICPC Act was bound to attract jurisdictional challenge given the federal character of the Nigerian polity and the general discontent with previous practice of military regimes to disregard the dynamics of federalism in governance and law-making.

The attempt by the Commission to prosecute an official of the Ondo State government set the stage for the inevitable challenge of the jurisdictional powers of the ICPC.⁹⁹ By virtue of section 232 of the 1999 constitution and in line with Nigerian constitutional practice, the Attorney-General of Ondo State on behalf of the state government headed for the Supreme Court. The section confers on the Supreme Court, original jurisdiction, to the exclusion of any other court, on any dispute between the federation and a state or between states *inter se* once the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. This was one such case.

He challenged the constitutionality of the ICPC Act by taking not just the Federal Government (protagonist of the legislation) to Court but also all the other 35 states in the country for the obvious reason that the decision in the case would automatically affect their interests. The relief sought by the Plaintiff was double-pronged. First, the Plaintiff sought an injunction of the Court to declare the law invalid on the ground that the law lacked jurisdictional validity for purporting to create a commission with powers to prosecute public and private individuals for offences within the states and in state high courts.¹⁰⁰ Secondly, and of even more significance, it sought a perpetual injunction to restrain the ICPC and the Federal Attorney-General from exercising or applying any of the provisions of the law in Ondo State. In effect, the law would thereby be invalidated as a whole. Counsel to the Plaintiff canvassed precisely that in concluding his address to the Court.¹⁰¹

The case for the Plaintiff (and some of the Defendants other than the 1st Defendant) was basically that no express or even implied provisions in the Constitution confer powers on the National Assembly to create a monolithic body with such an all-encompassing reach as the ICPC or the offences (of corruption) for which it was empowered to prosecute for the whole country. It was urged on the Court that the omission of a 'general power to create and punish offences' in the 'scheme of enumeration' (Legislative Lists) in the Constitution as referred to

⁹⁹ In Nigeria, like other federal systems, there are federal (central), states and local authorities' officials. 'State official' here refers to the narrower context of an official of a state government (constituent part) as against a 'federal' or 'local authority' in Nigeria's 36-state federation.

¹⁰⁰ In line with common practice in federal political systems, state and federal offences are prosecuted in the state and federal courts respectively.

¹⁰¹ *ICPC Case note 94 supra* at 10-13.

above precluded the National Assembly from enacting the ICPC Act.¹⁰² Thus the anti-corruption law and *a fortiori* the ICPC, were *ultra vires* the National Assembly as ‘corruption’ is a residual matter within the exclusive legislative competence of the state governments. It is pertinent to note the similarity of this argument with that proffered by the Plaintiffs in the (earlier) *Oputa Panel* case on the powers of the president to establish a truth commission for the whole country.¹⁰³ I will return to a juxtaposition of the two cases later.

Less than half of the states, sixteen, filed briefs of argument in the matter. Not surprisingly, they were evenly split (8 each) in their support for or opposition to the case for the Plaintiff. While thirteen completely abstained, counsels represented 6 at the hearing but were precluded from arguing a position due to procedural requirements that only parties who had filed a brief could canvass oral arguments before the Court.

At the core of the case for the 1st Defendant (the Federal Government) is the argument that the National Assembly was vested with the power to enact the ICPC Act pursuant to its constitutional powers to make laws for the ‘peace, order and good government of the Federation.’ The 1st Defendant conceded that the Exclusive Legislative List does not refer expressly to ‘corruption.’ It however argued that the National Assembly is constitutionally vested with the power to legislate as it did on corruption by a joint reading of several provisions of the Constitution. These include in particular the provisions of item 68 of the Exclusive List which provides that the National Assembly is empowered to legislate on ‘Any matter incidental or supplementary to any matter mentioned elsewhere in this list.’

The 1st Defendant further anchored its argument on a joint construction of sections 15 (5), 88 (2) (a) and (b) as well as paragraph 2 of Part III and item 60 (a) of the Constitution. Item 60 (a) relied upon by the Federal Government provides that the National Assembly has the power to establish and regulate authorities ‘for the Federation or any part thereof’ in order ‘To promote and enforce the observance of the Fundamental Objectives and Directive Principles’ contained in the Constitution. Section 15 (5) of the constitution tersely provides that ‘The State shall abolish all corrupt practices and abuse of power.’ Finally, section 88 (2) (a) (b) of the constitution provides that the National Assembly shall have the power to ‘expose corruption, inefficiency or waste in the administration of laws within its legislative competence.’

The Court sanctioned the legality of the ICPC Act. It noted that in view of section 4 (2) of the Constitution which provides that the National Assembly has the power to make laws for the peace, order and good government of the

¹⁰² Ibid. at 44.

¹⁰³ Incidentally, the same counsel for the Plaintiffs (Generals) in the *Oputa Case* note 5 *supra* proffered it.

Federation with respect to any matter included in the Exclusive Legislative List, it was *intra vires* the National Assembly to enact the ICPC Act under Item 60 (a) of the Constitution as canvassed by the 1st Defendant. Uwais CJN stated that the ‘Fundamental Objectives and Directives of State Policy’ can only be enforced by legislation. He dismissed the argument that the anti-corruption law ought to be limited to public officers and the three arms of government alone since it forms part of the ‘Fundamental Objectives and Directive Principles of State Policy.’ In identifying with the social realities of the country in relation to the challenge posed by corrupt and related practices, he declared that since

Corruption is not a disease which afflicts public officers alone...If it is to be eradicated effectively, the solution to it must be pervasive to cover every segment of the society [...].¹⁰⁴

‘Policy United’ All the Way

Clearly, as noted by Professor Ben Nwabueze, one of the *amici curiae*, the task of the Court in the case was ‘challenging because the issue impinges on the cardinal principles of Nigeria’s federal system.’¹⁰⁵ The ICPC Act in the view of the respected jurist was ‘subversive’ of the principles of federalism as enshrined in the Nigerian constitution and in violation of its constitutive doctrines of autonomy and non-interference.¹⁰⁶ The confluence of constitutionalism and a key-policy issue in a transitional context was bound to test the jurisprudence of the Court with resonance for the polity.

The special significance of the case was not lost on the Court. In a clearly uncharacteristic move (at least in recent memory), it invited three distinguished legal practitioners as *amici curiae* to address the Court on the case. All three filed separate (advisory) briefs of argument with two arguing against the legality and the third in support of the ICPC Act.¹⁰⁷ In an unbridled positivistic approach to the role of law in society, a highly regarded constitutional law jurist and retired Professor of Law, Benjamin Nwabueze, argued that the country was better placed to deal with corruption to which it had become accustomed than for the Court to uphold a legislation that tampers with the federal structure of the country and could lead to ‘grave political danger.’¹⁰⁸ The Court tilted the balance in favour of actively working against corruption, viewing it as the more dangerous phenomenon in the polity.

¹⁰⁴ ICPC Case note 94 supra at 28.

¹⁰⁵ Ibid. at 17.

¹⁰⁶ Ibid. at 18-19.

¹⁰⁷ Ibid. at 91.

¹⁰⁸ ICPC Case note 94 supra at 94.

It is germane to an understanding of the case to note that there is an allocation of legislative powers between the two tiers of government in the second schedule to the Constitution. The 'Exclusive Legislative List' itemises the exclusive jurisdiction of the federal (central) government while the 'Concurrent Legislative List' specifies the shared sphere of legislative powers between the two tiers. An unwritten *Residual Legislative List* is deemed in Nigerian constitutional practice to be the exclusive province of respective state governments on unlisted matters.

The learned Chief Justice displayed a utilitarian conception of the function of law to buttress his jurisprudential preference to sacrifice formalism (which could have accorded better recognition to the federal status of the country) at the altar of the (transitional) exigencies of the times when he further observed that 'the aim of making law is to achieve the common good.'¹⁰⁹ He took the view that 'state' in section 15 (5) applied to both the Federal and State levels of government in the country, and thus the power to legislate on corruption could be regarded as concurrent.

The point ought to be made however, that on a literal construction of the foregoing provisions and others in the Nigerian constitution, the Plaintiff and most of the Defendants who adopted the position, brief and argument of the former, were on quite firm grounds. To buttress this position, the Court did find some merit in the case for the Plaintiff and the case for the latter succeeded in part even if minimally, in respect of certain provisions which it sought to be declared *ultra vires* the ICPC. Incidentally, these were only aspects of the law the Court adjudged impugned on the judicial powers and independence of the courts. The court applied the *blue pencil rule* to strike down those sections.¹¹⁰

For good measure, it is noteworthy there are no specific provisions in the itemised list of legislative competencies in the Nigerian constitution conferring power on the National Assembly to enact law and establish a monolith anti-corruption agency for the whole country, desirable as this may be. The Court only came to such a decision by applying a *liberal* interpretation and imputing an implied existence of such powers

Reading these provisions of the 1999 constitution together and construed liberally and broadly, it can be easily seen that the National Assembly possesses the power both "incidental" and "implied" to promulgate the Corrupt and Other Related Offences Act, 2000 to enable the State which for this purpose means the Federal Republic of Nigeria, to implement the provision of Section 15(5) of the Constitution.¹¹¹

¹⁰⁹ Ibid at 29.

¹¹⁰ Ibid. at 32-33. Sections 26(5) and 35 are implicated in this.

¹¹¹ Ibid. at 35 per Wali JSC.

It is germane to note here that the Court addressed the tension between the policy choice to combat corruption through a monolith institution like the ICPC in pursuance of a holistic approach and the fundamental principle of federalism itself clearly enshrined in the constitution. Uwais C.J.N conceded the possible infringement of the ‘requirement of autonomy of the State government and non-interference with the functions of State government (sic).’ But he was quick to observe that such interference has constitutional support.

The learned Chief Justice waived the ‘cardinal principles’ aside as ‘best ideals to follow or guidance for *an ideal situation*’¹¹² again demonstrating the recognition of the transitional circumstances of the country and the policy considerations involved in the Court’s position on the matter. Ogwuegbu JSC was even more candid in his admission of the possibility of interference and a compromise concerning the doctrine of autonomy at the core of federalism the unanimous decision constituted. He readily sacrificed the latter for what he and other members of the Constitutional Panel of the Court considered to be the overriding priority to ‘make laws for the peace, order and good government of the Federation.’ He was of the view that corruption constituted a threat to all of these to and the ICPC Act was designed to combat the threat. In what can be regarded as poignant reflection of the letter and spirit of the judgement, he affirmed that

The Court is conscious of the history of corruption in Nigeria and should not be at liberty to construe the ICPC Act or any Act ...by the motives which influenced the Legislature, *yet when the history of the law and legislation tells the court what the policy and object of the Legislature were, the court is to see whether the terms of the Act are such as fairly carry out the policy and objective...*Any legislation on corruption must be of concern to every Nigerian.¹¹³

The Court was thus acutely aware of the *political nature* of its decision. The remarkable identification of the Court with the aspirations of the society and its preference for a purposive jurisprudential approach constituted unparalleled exceptionalism in the history of judicial constitutionalism in Nigeria.

4. VALIDITY OF PURPOSIVE JURISPRUDENCE IN NIGERIA’S TRANSITION

Barak posits that the purposive judicial interpretational approach is the ‘proper system of interpretation’ of the constitution and statutes alike in democratic

¹¹² ICPC Case note 94 supra at 30.

¹¹³ ICPC Case note 94 supra at 59 to 61. Emphasis mine.

societies.¹¹⁴ If we agree with this postulation then the purposive interpretive approach is even more apposite for adjudication in transitional contexts where immense national and international resources are usually deployed to effect institutional transformation and restoration of the rule of law.

Displacing Positivism in Transitional Contexts

A comprehensive reading of the judgements delivered by each of the six justices in their concurrence with the lead judgement in the *ICPC* Case reveals a purposive jurisprudence that identified with the peculiar historicity of corruption in the country. Thus the Court waxed quite strong on casting its lot with policy measures regarding one of the salient programmes stated in the inaugural address of then incoming President Olusegun Obasanjo. In this regard, Uwaifo JSC declared in his judgement

The issue of corruption and abuse of power has become international. It is a declared state policy in Nigeria to combat it and so it has assumed a national issue of high priority which is considered best suited for the National Assembly to be addressed through a federal agency like the ICPC.¹¹⁵

Similar advertence to the foregoing principles and the ‘peace, order and good government’ provisions adopted by the Court in the *ICPC* Case would have served equally well to save the *Oputa Panel* Case from being determined along so narrow lines as did the Court on that occasion. The Court in coming to the decision to uphold the ICPC Act clearly made a policy decision to reject the *black letter* of the law. Positivists (especially) may strongly deprecate such an approach in *normal* situations as fostering uncertainty in the law. But that is precisely the point that the Court missed in the *Oputa Panel* Case. Transition contexts are not *normal* contexts. While certainty in the law requires the judiciary to be *consistent*, consistency in transitional societies ought to be in full awareness of and attuned to the social context.

Teitel’s contention that in transitional contexts, positivism of law is dependent on the ‘popular perception in the public sphere,’¹¹⁶ is apt to the Nigerian situation. Thus the adoption of a liberal purposive approach as demonstrated by the Supreme Court to the social realities of the country in its attempt to *break with the past* it is argued, is to be preferred to the plain-fact or literal approach that may be the appropriate course in the absence of social contingencies challenging the very foundations of societies in political transition. This is what Teitel considers as the ‘social construction of the law’; one of the

¹¹⁴ Barak note 11 supra at 26. 66-82.

¹¹⁵ Ibid at 116.

¹¹⁶ Teitel note 21 supra at 207.

paradigmatic shifts from conventional understandings of the rule of law relevant to conceptions of law in transitions.¹¹⁷

In the pre-transition period, Nigerian society had been victim of economic and financial rape leading to monumental social deprivations perpetrated by the largely predatory ruling elite. The deplorable situation was occasioned partly by weak legislation and law enforcement arrangements as well as a corrupt and compromised judiciary. Bell et al, much like Teitel, argues that law as well as legal institutions suffer degradation in conflict (and repressive) situations that impair their legitimacy. Thus, both the law and legal institutions must facilitate as well as be changed themselves.¹¹⁸ Perhaps in realisation of this the Court opted here for a ‘constructivist,’¹¹⁹ transformative model of adjudication and actively led the way in support of the expressed popular desire for checkmating past injustices and continuing similar injustices.¹²⁰ The concluding remarks of Ogwuegbu JSC convey the attitude of the Court in the case. At the risk of descending into the adversarial arena, he candidly voiced what is no doubt popular opinion on the matter in the Nigerian society

I must also point out that all Nigerians except perhaps those who benefit from it are unhappy with the level of corruption in the country. The main opposition to the ICPC Act is I believe, borne out of fear and suspicion.¹²¹

Deepening the Rule of Law in Transitional Contexts

There is also the sense in which the decision in the *ICPC* Case significantly deepens the rule of law in the country. This is in the way it has strengthened the hands of prosecutors who are reassured that no one will be above the law in the fight against corruption. The decision signals clearly that it would not be ‘business as usual’ for corrupt public and private actors who had held the country hostage and taken it to ‘the nadir of the miasma of corrupt practices.’¹²² Recently, the chief prosecutor and highest ranking law officer in the country, the Attorney-General of the Federation after coming under strident public criticism for his perceived toleration of corruption by public officers declared an all out war on corruption. He vowed to ensure the prosecution of all established cases of corruption by public officers in the post-transition period till date. The prosecution would leave no sacred cows, as ‘governors, ministers and any other

¹¹⁷ Ibid. at 2027.

¹¹⁸ Christine, Bell et al. “Justice Discourses in Transition” *Social & Legal Studies* 13 (3) (2004) 305, 309.

¹¹⁹ Ibid. at 2014

¹²⁰ Joseph, Richard. “Africa: States in Crisis” *Journal of Democracy* 14 (3) (2003): 159, 167.

¹²¹ *ICPC* Case note 94 *supra* Ibid at 67.

¹²² *ICPC* Case note 94 *supra* at 133 per Uwaifo JSC

government official mentioned in those reports would be prosecuted.’¹²³ In this regard it is noteworthy that recent research on public perceptions of institutional performance and legitimacy in the democratic transition in Nigeria indicates a ‘growing approval for anti-corruption efforts.’¹²⁴

The role of the judiciary in adopting a purposive approach to salient foundational issues in the anti-corruption project, with its notable impact on the rule of law, cannot be divorced from such perceptions. This is particularly so granted that clamours for transparency in the management of public funds on the one hand, and prosecution of erring corrupt public office-holders on the other, have assumed centre-stage in the criminal justice administration system in the country in recent times than ever before.¹²⁵ A clear manifestation of the situation is the tremendous support (including again, judicial) for the establishment and activities of the Economic and Financial Crimes Commission (EFCC), despite the clear overlap in the functions and powers of the two and the elaborate structural arrangements that have been made for their effective operations.

Teitel has stated that the judiciary more than any other arm of government is better situated to facilitate change in transitional societies.¹²⁶ In the event there appears to be substantial political will in the other arms of government to design a policy to effect radical change, it would be counterintuitive for the judiciary to frustrate such policy initiatives. Mass public support for an anti-corruption policy in the Nigerian context is better appreciated against the background of the fact that the statute books have for decades provided some of the severest punishments (including death sentence in some cases) for property crimes like robbery, stealing, arson and related offences generally considered crimes within the province of underprivileged felons. The anti-corruption drive with its seeming emphasis on ‘grand’ (as against ‘petty’) corruption¹²⁷ was viewed as more inclusive if not specifically targeted at the criminally-minded members of the upper strata of the society.

The decision of the Court in the *ICPC* Case constitutes a defining moment, a watershed in the country’s nascent anti-corruption policy. The enormity of the corruption scourge in the country is highlighted by the fact that the ICPC is finalising prosecutorial arrangements on more than 20 former state governors

¹²³ Aboyade, Funke “Aondoakaa to Prosecute Persons Indicted by National Assembly” *This Day* Online (Abuja Saturday 20 October 2007).

¹²⁴ Lewis note 91 *supra* at 8.

¹²⁵ Ojo, Olakunle and Abubakar Mustapha “CLO, TMG Want EFCC, Conduct Bureau to Try Etteh” *The Guardian* Online Edition (Lagos Saturday 29 September 2007). Available <http://www.guardiannewsngr.com/news/article05>

¹²⁶ Teitel note 21 *supra* at 2033

¹²⁷ Uslaner Eric “Corruption and the Inequality Trap in Africa” Afrobarometer Working Paper No. 69 (April 2007) Available at: <http://www.afrobarometer.org/chapters/AfroPaperNo69.pdf> (25 September 2007).

barely 4 months after they left office and lost executive immunity from prosecution for official corruption and abuse of office.¹²⁸ At least one of the former governors has been convicted for money laundering and corrupt enrichment following his impeachment and four others are currently on trial on similar charges.

The Court made a remarkable break with the past in the *ICPC* Case moving tangentially along some of the very lines it was to reject later in part or whole in the *Oputa* case. One of the most obvious in this regard is the readiness of the court to accord a prominent place to policy considerations particularly in the context of transition. This attitude was prominent not only in the lead judgement but ran through all the separate concurring decisions in the *ICPC* Case. There is also of course the unanimity of the 7 *wise men*. It is significant that the issue of ‘policy’ consideration was cited in the latter decision with unanimous approbation and expressed in the lead judgement rather than in reprobation and dissent that characterised it in the *PDP* Case. Recall that Ogundare JSC raised this point in condemnation of the majority decision in the *PDP* Case. He had stated that

It is not for the Court to determine what the legislature meant to say but what it actually said. Nor is the court to read something into such provisions on the grounds of policy¹²⁹

no doubt in obvious disregard of the dynamic role of law and the judiciary in transition. In implicit disavowal of its long-standing formalist jurisprudential approach, the Court did not refer to any of its earlier decisions that relied so heavily on ‘policy considerations.’ The Court indeed closed its eyes to positivist adjudications to keep the flow of the waters of law and politics pure and separate.

Beyond Provincialism

Equally significant was the willingness of the Court to engage in a comparative juridical approach in its judgement in the *ICPC* Case. It analysed with approval, many foreign cases from other federal jurisdictions bearing on transition, emergency, and more generally, cases with significant implications on national life. It had hitherto demonstrated a judicial proclivity for ignoring even relevant international law obligations of the country in the context of the transition as with the *Oputa* Case.

Thus, a good deal of the *rationes decidendi* in the *ICPC* Case was rooted in foreign precedents specifically from federal jurisdictions like the United States,

¹²⁸ See F Oretade “ICPC to Speed up Ex-Governors’ Trials” *ICPC News* (Monday 3 September 2007) Available at: http://www.icpc.gov.ng/read_news.php?id=61 (3 September 2007) and F Igwuoke “Speakers Back Ex-Govs’ Trials” *This Day* (Abuja Sunday 22 July 2007).

¹²⁹ *PDP* Case note 77 *supra* at 91.

Canada and Australia. This marked a departure from an established tradition of insularity in which otherwise relevant foreign decisions were considered by the courts with suspicion and declared inapplicable in the country. It is significant to the extent that failure to benefit from and accord recognition to such decisions delivered in similar contemporary socio-political contexts (like the South Africa transitional experience) hampered the development of a robust human rights jurisprudence and culture in the country. Adherence to comparative law constitutes one of the tools to achieve an effective discharge of the duties of judges in a democracy, particularly in the context of an increasingly globalized world.¹³⁰ In the converse then, neglect of comparative perspectives may deny national courts of potentially perspicacious jurisprudential insights.

Peace, Order and Good Governance to the Rescue

Another striking feature of the decision in the *ICPC* Case is the heavy store (rightly) placed by the Supreme Court on the constitutional provision that the National Assembly had the power to legislate for the ‘peace, order and good government’ of every part of the federation. As I argued earlier, rejection of this provision by the Court in the *Oputa* Case constitutes a fundamental misdirection regarding the role of law in the context of transition. Granted that the shaky legal arrangements of the *Oputa* Panel made the intentions of the executive less credible at best, it would have better served the purpose of the rule of law and justice to victims of impunity to uphold the process than to chip away the basis of its legal validity through unrepentant and rigid plain-fact jurisprudence.

The foregoing argument is reinforced by the fact that the TIA, which was in issue in the *Oputa* Panel case, started its life and was so upheld by the Court as a valid Act passed by the National Assembly. It thus shared a critical element with the ICPC Act; it is meant to ensure the ‘peace, order and good government’ of every part of the federation without precluding state governments from enacting similar legislation. In any event, the purpose it was deployed to serve in the establishment of the *Oputa* Panel was clearly for that. That the Court ought to have followed this purposive approach is underlined further by the fact that it appeared to have laid firm foundation for transition jurisprudence in the majority decision in the relatively earlier *PDP* Case. This it did in spite of the unsuccessful attempt to retain it on the well-worn tracks of plain-fact jurisprudence. But the Supreme Court failed when it upheld the jurisdictional argument against the *Oputa* Panel on the basis that the legislative lists do not mention ‘Commission of Inquiry’ or ‘Tribunal of Inquiry’ in the 1999 Constitution and thus held that it is

¹³⁰ Barak note 11 supra at 110-114.

thus a matter for the unwritten *Residual List* ostensibly within the exclusive ambit of the states.

5. DISCORDANT TUNES

One of the important functions of judges in their interpretive role is the creation and sustenance of ‘normative harmony.’ This ensures individual statutes are creatively interpreted as part of an integrated legal system.¹³¹ Failure of the judiciary, especially at the highest levels, to foster an integrated and consistent approach to the interpretive role, particularly in the context of transition tends to jeopardise the critical role outlined for the transition judiciary by Teitel. The judiciary would then be failing in its role of ‘bridging the gap... between law and society.’¹³²

It is pertinent to determine further whether the judiciary, faced with the challenging dynamics of law and justice in the context of transition, has itself become transformed, the accountability gap notwithstanding. It is possible to come to a positive conclusion at first blush. Scrutiny however suggests differently. The jurisprudence emanating from the Nigerian judiciary in the post-military authoritarian period from the vertical and horizontal levels appears to be discordant at best.

Ambivalence or New Directions

It would appear that an ambivalent disposition continues to characterise the decisions of the Court. This view of the matter could of course be challenged particularly in view of recent acclaim offered in connection with a number of transition-related decisions delivered by the judiciary, the Supreme Court in particular. They centre on constitutional issues generated from a rash of election related cases in the heated political scene in the country. Commentators have been described some of them as ‘landmark’ decisions.¹³³ The judiciary has even received plaudits from usually critical quarters.¹³⁴ In addition, public opinion surveys focusing on election petition tribunals, which adjudicate the highly

¹³¹ Barak note 11 supra at 35.

¹³² Ibid.

¹³³ See for instance Akiri Chris. “Obi: Advantages of the Supreme Court Ruling” *The Guardian* (Lagos Wednesday 27 June 2007). See also Brown, Makinde. “Election Petitions and the Judiciary” *The Guardian* Online Edition (Lagos Friday 1 June 2007)1-3, and Njoku, Lawrence “Appeal Court Reinstates Obi- Factional Lawmakers File Stay of Execution of Judgment” *The Guardian* Online Edition (Lagos Sunday 11 February 2007) 1-4.

¹³⁴ See for instance Iriekpen, Daniel. “Agbakoba, Falana Commend S’Court” *This Day* Online Edition (Abuja Friday 15 June 2007).

controversial ‘civilian-civilian’ election transition cases in the country, also suggest the judiciary has been the most ‘consistent’ branch of government in the transition period.¹³⁵ Others have described the judiciary as ‘the hero of Nigeria’s democracy.’¹³⁶

In view of these examples therefore, ought not the Nigerian transition judiciary to be commended for overcoming its previous questionable record of judicial governance? Commendable as the above appraisals may be, however, they constitute no more than flashes in the pan of the situational circumstance of judicial activity in the country. In this regard, it is important to consider the temporality of the foregoing decisions and other contemporary transition cases and the trends they reflect. Consider that the Court in its decision in the *Oputa Panel Case* that was decided more than three years after the *PDP Case*,¹³⁷ seemed to have still been caught up in its old plain-fact jurisprudential approach despite the purposive approach signposted by the majority decision in the latter. It bears repetition furthermore, that a seven-man constitutional panel unanimously decided the *Oputa Panel Case* in defiance of international law obligations of the country to victims of gross violations of human rights. The relapse violently displaced the purposive approach advocated by the constitutional panel of the Court in the *PDP Case*.

The *Oputa Panel Case* clouded even the commendable purposive approach of the *ICPC Case* decided on 7th June 2002 and despite their contemporaneousness, there was no reference in any one to the other at all levels of the courts involved. The failure of cross-citation reflects a lack of coherence in the jurisprudential outlook of the Supreme Court. In a common law based legal system where precedent is at the nerve-centre of judicial-decision making, such lack of clear judicial direction necessarily impacts on the lower courts.

Again it is germane to recall that the purposive decision in the *PDP Case* was itself seriously *threatened* at the time and was only achieved at the closest possible split of 4/3. This was despite the obvious threat to the rule of law a counter decision posed in the prevalent fragile political environment of a non-negotiated transition. It is important to note too that none of the cases made any explicit reference to the transitional status of the Nigerian society, momentous as

¹³⁵ Shobiye, Hameed. “Poll Applauds Kogi Election Tribunal” *Punch On the Web* (Lagos 24 October). Available at:

<http://www.punchontheweb.com/Articl.aspx?theartic=Art2007102317195673> (24 October 2007).

¹³⁶ Mammah, Emmanuel et al. “Kebbi Governor, Yar’Adua’s In-Law, Election Voided” *Vanguard Online* (Sunday 21 October 2007). Available at: <http://odili.net/news/source/2007/oct/21/399.html> (25 October 2007).

¹³⁷ The Supreme Court decided the *PDP Case* expeditiously on 11th May 1999 on time for the inauguration of the Plaintiff on 29th May 1999 and gave its full reasons on 16th July 1999. The *Oputa Panel Case* was decided on 31st January 2003. The Supreme Court did not at all advert to the purposive approach in the *PDP* and *ICPC* Cases when it decided the *Oputa Panel case* in 2003.

this was in all three cases in particular and the socio-political circumstances of the time. All of these suggest the absence of a coherent purposive jurisprudential approach that behoves a transitional judiciary.

6. CONCLUSION

The need for all institutions of governance to participate in obtaining redress for human rights violations in post conflict societies is underscored by the necessity of a process of accountability to serve as the foundation for establishing the rule of law in such societies.¹³⁸ The judiciary considering its usually privileged stability in the face of political upheaval must be at the forefront of institutionalising the rule of law particularly in post transitional contexts.

The enunciation of a radical, transformative jurisprudence by the judiciary holds considerable promise for the restoration of the rule of law and at the institutional level, signals a definitive break from the past.¹³⁹ Such judicial disposition is particularly important in transition societies where the executive and legislature in the new *democratic* dispensation may owe avowed loyalty to or are actual protégés of the former illiberal regime, thus at the risk of potentially derogating from the quantum of real representation of the common interest.

The judiciary in societies in transition cannot remain aloof of the realities of the operating environment even if only for the pragmatic necessity to maintain its relevance in society. It has a critical role to play in mediating conflict and upholding human rights through a robust interpretation of law. This is particularly so in societies like Nigeria, where the judiciary has been previously implicated in validating authoritarian rule and thus undermining the rule of law. An activist stance will enable the judiciary to earn credibility, promote justice, foster peace and contribute to societal recovery and development. Such a proactive role is of particular relevance in developing and transitional societies where the judiciary had been noted for ‘usurper friendly’ jurisprudence.¹⁴⁰

In the performance of its adjudicatory role in the *Oputa Panel Case*, the Nigerian judiciary opted for a conservative approach to the issues at stake in the emergent contestations. The judiciary not only failed to engage with the established international human rights standards on the right to truth and remedy for victims of gross human rights violations, but also the dynamics of a society in transition. This left *the truth* in jeopardy and victims in despair.

¹³⁸ Tolbert, David and Solomon Andrew. “United Nations Reform and Supporting the Rule of Law in Post Conflict Societies” *Harvard Human Rights Journal* 19 (2006): 29, 34.

¹³⁹ Teitel note 21 *supra* at 2033.

¹⁴⁰ Ogowewo, Tunde I. “Self-Inflicted Constraints on Judicial Government in Nigeria” *Journal of African Law* 49 (1) (2005):39, 42.

In post-authoritarian societies, the public expect much of the judiciary. Such demanding expectations derive partly from the fact that it has the longest history of functional institutional stability compared to the executive and legislative branches of government, since both are invariably trumped by military political-adventurism and authoritarian rule. Ironically, the judiciary, typically steeped in well-worn traditions and customarily exempt from popular public accountability mechanisms, deployed in transitional societies may be slow or even unwilling to take on headlong the challenges of social transformation. It may be ill prepared or even oblivious of these *great expectations* and its important role in the transitioning polity.

However, the discussion in this article on judicial constitutionalism in Nigeria's political transition suggests that a combination of public-driven factors may significantly impact the state of judicial inertia in transitions. Such factors may reconfigure judicial synergy, redirecting the judiciary to the realisation that it cannot but move with the socio-political realities of the times. It will thus be primed to join the front seat in taking on a proactive role in governance and moving the transitioning state forward as evinced in the *ICPC* and *PDP* decisions. How well it proceeds on the path that takes forward this purposive approach is dependent on its ability to make a distinct break with a past tainted by complicit jurisprudence.

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